Supreme Court, U.S.
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No. 00-566

IN THE

Supreme Court of the United States

BRIAN WILLIS,

Petitioner,

v.

SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency and LIN BUSHORE, individually and in her official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents, SCHOOL BOARD OF ST. LUCIE COUNTY and LIN BUSHORE, submit this brief in opposition to the petition for a writ of certiorari filed by BRIAN WILLIS. WILLIS was the Appellant in the proceeding before the Eleventh Circuit Court of Appeals. The SCHOOL BOARD OF ST. LUCIE COUNTY and LIN BUSHORE were the Appellees below.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendments to the United States Constitution as well as 42 U.S.C. § 1983.[1]

STATEMENT OF THE CASE

The Respondents filed a Motion for Summary Judgment, which was granted on all claims including immunity for the School Board and Bushore by the District Court for the Southern District of Florida and affirmed by the Eleventh Circuit Court of Appeals. The Order granting Defendants' (Respondents in the instant appeal) Motion for Summary Judgment is the basis of the instant appeal. In its Motion for Summary Judgment, the Respondents maintained that even if the allegations that were set forth by the Petitioner in the pleadings submitted to the lower courts are true, there is no cause of action for violation of the First Amendment's constitutional rights to free speech and free association.[2]

The material facts underlying the Motion for Summary Judgment are as follows. Brian Willis (hereinafter Petitioner)

1. In his complaint and subsequent appeal to the Eleventh Circuit, Petitioner also argued that the Respondents violated his right to freedom of association. However, Petitioner has not included this claim in his petition for writ of certiorari. Therefore, the Respondents have not addressed this issue.

2. If the Order granting summary judgment were reversed on appeal, the Respondents intend to contest certain material facts alleged by Petitioner.

was employed as a teacher by the School Board of St. Lucie County for the 1996/97 school year. During the year that Petitioner was employed, there was an internal investigation of misconduct of another teacher at Westwood High School named Lee Barron. Petitioner alleged that Principal Bushore asked Petitioner to participate in the internal investigation of Barron, which he refused to do. *Petitioner refused to cooperate and testify at all — whether truthfully or falsely.*

Petitioner's position was on an annual contract, subject to reappointment or nonrenewal each year. Petitioner was not recommended for reappointment by Principal Bushore to the Superintendent who made the recommendation to the School Board, which was approved.

REASONS FOR DENYING THE WRIT

The Petitioner contends that certiorari should be granted in order to decide the following important federal question: "whether silence can **still** be protected speech in public employment." [emphasis added] See Petition for Writ of Certiorari, page 3. However, the petition fails to set forth a basis for finding that the instant case presents an important federal question that requires the Court's review. This case is an appeal of an order granting summary judgment based on uncontested facts. It does not present the Court with a novel issue or a new policy for determination. Further, the lower court granted summary judgment to the School Board and Bushore on the grounds of immunity and Petitioner has not raised that issue in his petition for writ of certiorari. Therefore, even if the free speech issue was reversed, the case is moot because the lower court granted immunity for the School Board and Bushore, which was upheld by the Eleventh Circuit.

The Petitioner presented for certiorari the question of whether silence can be protected speech in public employment. Yet, in his legal argument, Petitioner answered

the very question that he certified. Petitioner cites cases that acknowledge that, under certain circumstances, the right to refrain from speaking has been held to be protected speech. *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). The Petitioner even cites the Eleventh Circuit in *Sykes v. McDowell*, 786 F.2d 1098, 1104 (11th Cir. 1986) for the proposition that silence can be protected. See Petition for Writ of Certiorari, page 5. So it appears that the Petitioner has responded to his own question presented: silence is still protected under the First Amendment *under certain circumstances*. What Petitioner fails to recognize is that silence is only protected under limited circumstances and that this Court has set forth a test for determining when speech or the refusal to speak will be protected by the First Amendment to the Constitution.

In order for "speech" to be protected under the First Amendment, it must both 1) address a matter of public concern, *and* 2) outweigh the employer's interests. *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). In contrast to the Petitioner's assertion that courts are applying a "mathematical formula," the entire purpose of the Pickering test is to **balance** the competing interests of a public employee's right to free speech against the interest of the employer in its operations. Moreover, this Court recently denied certiorari to review an appeal of *Wasson v. Sonoma County Junior College*, 203 F.3d 659, 2000 WL 166838 (9th Cir.), *cert. denied*, 121 S. Ct. 305, 69 USLW 3255 (October 10, 2000). In *Wasson*, the Ninth Circuit Court of Appeals held that a public employee failed to state a claim that her employer wrongfully retaliated against her for the exercise of First Amendment rights to free speech when she denied having made the speech in question.

In the instant case, Judge Middlebrooks held that Petitioner's speech did not address a matter of public concern:

> [Willis] never participated in any formal proceedings, never gave any testimony, sworn or unsworn, and no process was ever invoked to ask him to provide testimony. He never spoke with the lawyer from the School Board's law firm who was conducting the internal investigation of Mr. Baron [sic]. Under these circumstances, it is questionable whether speech is implicated in this case at all, much less speech on a matter of public concern.

Furthermore, even if Petitioner's refusal to speak under the facts of this case were found to be protected, Petitioner still does not meet the second prong of the Pickering test because his interest in the protected speech does not outweigh the School Board's interest. Rather, the Petitioner's right to free speech is outweighed by the Respondent's interest in complying with harassment laws. Under various federal and state laws, the Respondent must conduct investigations in order to determine what action, if any action is appropriate in the case of wrongdoing. Petitioner does not allege that he was retaliated against for testifying **truthfully**. Rather, the Petitioner refused to *testify at all*. Under the facts of this case, the employer's interest in conducting an internal investigation outweighs the Petitioner's right to refuse to cooperate so the speech is not protected under the First Amendment.

Furthermore, even if the Court were to find that a valid free speech claim exists, neither the School Board nor Bushore is liable. The District Court found that the School Board and Bushore are entitled to immunity, which was upheld by the Eleventh Circuit. Although Petitioner filed the instant petition within the time permitted, he did not seek review of the immunity issue.

Regardless, even if the Petitioner had appealed on the issue of immunity for Bushore, the District Court's ruling

should be affirmed. An official is entitled to qualified immunity unless, in the exercise of his or her discretionary authority, they violated a "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07, 102 S. Ct. 2727, 2738, 73 L. Ed. 396 (1982). As explained by the District Court, "In First Amendment retaliation cases it is especially difficult to overcome the shield of qualified immunity. *Johnson, supra*, 74 F.3d 1087 (11th Cir. 1996); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989)." Simply the fact that this issue is highly contested and has reached the United States Supreme Court shows that the conduct alleged did not violate clearly established law and, therefore, Bushore is entitled to immunity.

Likewise, even if the issue of immunity for the School Board had been raised in the petition, the District Court's ruling should be affirmed. A local government, which includes school boards, is only liable for a violation of 42 U.S.C. § 1983, if the actions complained of were undertaken by a municipal policymaker. Under Florida Statutes, the School Board has final policymaking authority. Therefore, the School Board is entitled to immunity as found by the District Court and upheld by the Eleventh Circuit Court of Appeals.

CONCLUSION

Based on the foregoing, Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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